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Miscellaneous—Master and Servant

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requisite unanimous vote is not possible. Therefore the only remedy available to remove such a director would be under section 60 of the General Corporation Law.[39] It is suggested that if the contract of incorporation requires a unanimous vote of all the stockholders, a provision should be inserted excluding the unanimous vote in the case of the removal of a director. The requirement of a majority vote should be sufficient in instances such as this.

Master and Servant

Where the plaintiff's complaint has been dismissed by a lower court, the Court of Appeals must view the facts in a light most favorable to the plaintiff and, in determining whether the facts proved constitute a cause of action, give him the benefit of every favorable inference which may reasonably be drawn.[40]

The test of liability of the master for the tortious acts of his servant is whether there was an express or implied authority for doing the act relied upon by the plaintiff — *i.e.,* whether the servant was acting within the scope of his employment.[41] Although the wrongful act of the employee may have been one which was unauthorized, the subsequent approval and ratification by the employer may be sufficient to impose liability upon him.[42] What constitutes a ratification of an act which appears to have been unauthorized is a question of fact.

In *Simon v. Ora Realty Corp.*,[43] an action was brought against a tenement house owner for injuries sustained by an infant when a loaded ash can fell on him as he was assisting the janitor in removing the cans from the cellar of the house by means of a hoist. The trial court dismissed the complaint at the close of the entire case upon the ground that there was no proof that the janitor had express or implied authority to request assistance from others, nor that the corporate defendant acquiesced in any such course of conduct. The Appellate Division affirmed the dismissal by the trial court.[44]

Evidence adduced at the trial tended to show that the operation of the hoist would be a difficult task for one man to accomplish and that the janitor had been in the practise of inducing neighborhood boys to help him with the removal for

39. N. Y. GEN. CORP. LAW §60: An action may be brought against one or more of the directors or officers of a Corporation to remove him from office . . . ; Under GEN. CORP. LAW §61, however, such an action may be brought only by the Atorney General.

40. *Faber v. City of New York,* 213 N. Y. 411, 107 N. E. 756 (1915); *Shuman v. Hall,* 246 N. Y. 51, 158 N. E. 16 (1927).

41. *Ramsey v. New York Cent. R. Co.,* 269 N. Y. 219, 199 N. E. 65 (1935).

42. *Dawlen v. Johnson,* 225 N. Y. 39, 121 N. E. 487 (1918).

43. 1 N. Y. 2d 388, 135 N. E. 2d 580 (1956).

44. 281 App. Div. 962, 120 N. Y. S. 2d 656 (1st Dep't 1953).

many months prior to the accident. A tenant also testified that the "landlady" visited the place frequently and either she or her sons collected the rent.

From this evidence, the Court felt, it would not be unreasonable for a jury to infer that the defendant knew, or should have known, that its employee was in the habit of seeking aid from young boys to assist him in his work for the defendant. Thus a jury could have concluded that the defendant acquiesced in the practise or that because of the nature of the work, the defendant made it necessary for the janitor to enlist the aid of these boys, by failing to provide assistance to the janitor.

There was further evidence that the can which fell was faulty and that the janitor may have been negligent in failing to warn the plaintiff of the danger in the work. Other evidence tended to show negligence in hoisting the can and in failing to supervise the fastening of the rope by which the can was hoisted. This evidence, the Court reasoned, raised questions of fact for the jury and did not show the plaintiff was guilty of contributory negligence as a matter of law.

On this evidence and set of facts, it is apparent that the Court was correct in reversing the lower courts and granting the plaintiff a new trial; the plaintiff had raised sufficient questions of fact to escape dismissal.

Construction of Tariff Rates

In *Bianchi v. Sears Roebuck and Co.*,[45] the Court held that interior loading did not include removal of goods from a platform which, although it was one continuous floor, extended into a warehouse. The plaintiff, a common carrier of goods for hire by truck, performed pick-up and delivery services for the defendant. According to a tariff schedule[46] on file with the Public Service Commission, goods accepted at the platform or entrance to the shipping room were chargeable at the regular rates, whereas those which had to be removed by the carrier from the interior of a building, basement or above the ground floor were subject to an additional charge.

45. 1 N. Y. 2d 63, 133 N. E. 2d 699 (1956).

46. Pick-Up and Delivery Service (a) . . . the rates published in tariffs governed hereby, include one pick-up . . . . (b) Shipments will be accepted at . . . platform or entrance to shipping or receiving room of consignor . . . when directly accessible to carrier's motor vehicle at the street level. (d) Pick-up . . . does not include removal from . . . the interior of a building nor basements or floors not directly accessible to carrier's motor vehicle . . . . (e) When carrier upon request, is obliged to perform pick-up or delivery service to or from the interior of a building, basement or above the ground floor . . . an additional charge will be made . . . .